STATE OF MICHIGAN

COURT OF APPEALS

LISA CAVER,

Plaintiff-Appellant,

v

SODEXO, INC.,

Defendant,

and

POWERLINK ENVIRONMENTAL SERVICES, LLC,

Defendant-Appellee.

UNPUBLISHED
April 21, 2015

No. 319982
Wayne Circuit Court
LC No. 11-014688-NO

Before: BECKERING, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant, Powerlink Environmental Services, LLC, in this negligence action. We affirm.

While working at Henry Ford Hospital as a registered nurse, plaintiff slipped and fell on a wet floor in a patient's room and injured her back. Plaintiff alleged that she had no way of knowing that the floor was wet, but defendant's employee had recently mopped the floor in that room. At the time, defendant leased housekeeping staff to Henry Ford pursuant to a personnel service agreement. The housekeeping staff, however, was selected, trained, and supervised by Sodexo pursuant to a master service agreement. Plaintiff initially filed her negligence complaint against Sodexo, but subsequently added defendant by amended complaint. Plaintiff alleged: "Defendant(s), individually and by and through its/their agents, servants and/or employees, owed the public generally and more specifically to the Plaintiff, certain duties to engage in the course of their business(es) and to service hospital rooms and surrounding areas in a safe and prudent manner."

Eventually Sodexo filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), arguing that plaintiff could not demonstrate that she was owed a duty of care separate and distinct from Sodexo's duties arising out of its contractual obligations, i.e., no

independent duty to her existed. See *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004). Sodexo noted that none of its employees performed housekeeping duties; rather, its employees supervised defendant's employees who were performing housekeeping duties.

Defendant filed a "concurrence and joinder" with Sodexo's motion for summary disposition. Defendant argued that it provided housekeeping staff to Henry Ford pursuant to a contractual agreement and plaintiff was not a party to that contract. Consequently, as Sodexo argued, plaintiff could not demonstrate that she was owed a duty of care separate and distinct from defendant's duties arising out of its contract with Henry Ford. And, defendant argued, Sodexo's employees were responsible for training and supervising housekeeping staff, not defendant.

Plaintiff responded to defendants' requests for summary disposition, arguing that the assumption of contractual obligations does not extinguish preexisting common-law duties owed to a plaintiff in the performance of a defendant's contract. See *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 169-170; 809 NW2d 553 (2011). Here, defendants owed plaintiff a common-law duty to use ordinary care to avoid physical harm to her in performing their contractual obligations. The trial court agreed, in part, concluding that Sodexo owed plaintiff a duty of care and denied its motion. However, the court granted summary disposition in defendant's favor, explaining that it "didn't see a liability" on defendant's part because defendant did not supervise housekeeping staff. That decision is challenged here.

We review de novo a trial court's decision on a motion for summary disposition. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). Because the parties and the trial court relied on matters outside of the pleadings, MCR 2.116(C)(10) is the appropriate basis for review. See *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a party's claims. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). The pleadings, affidavits, and other documentary evidence is viewed in a light most favorable to the nonmovant to determine whether a genuine issue of material fact exists. *Odom*, 482 Mich at 466-467 (citation omitted). The issue whether the defendant owed the plaintiff a duty of care is a question of law subject to de novo review. *Loweke*, 489 Mich at 162.

In a negligence action, the threshold issue is whether the defendant owed the plaintiff a duty to avoid negligent conduct. *Maiden v Rozwood*, 461 Mich 109, 131; 597 NW2d 817 (1999). A defendant's contractual obligations may give rise to a duty to a non-contracting third party, but there is also a preexisting obligation to avoid harm when one acts. See *Rinaldo's Const Corp v Mich Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997) (citation omitted). As explained by our Supreme Court in *Loweke*:

> Courts have misconstrued *Fultz*'s test requiring a separate and distinct duty by erroneously focusing on whether a defendant's conduct was separate and distinct from the obligations required by the contract or whether the hazard was a subject of or contemplated by the contract. This interpretation is incorrect because, in analyzing tort actions based on a contract and brought by a noncontracting third party, *Fultz* directed courts to focus on whether a particular defendant owes *any duty at all* to a particular plaintiff, and, thus, generally required an inquiry into

> whether, aside from the contract, a defendant is under *any* legal obligation to act for the benefit of the plaintiff. [*Loweke*, 489 Mich at 168 (emphasis in original, quotation marks and citations omitted).]

Determining whether a separate and distinct duty exists does not necessarily involve an analysis of the underlying contract. *Id*. at 169. The separate and distinct duty to support a tort claim can arise "by a number of preexisting tort principles," including the common-law duty to use due care in undertakings. *Id*. at 170. This common-law duty was explained in *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967), as imposing "on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Id*. at 261. This common-law duty is not extinguished by the existence of a contract. *Loweke*, 489 Mich at 159.

In this case, plaintiff sought to hold defendant liable for her slip and fall injuries on the ground that defendant's employee "negligently mopped the floor without warning the Plaintiff and without posting any kind of 'wet floor' sign." We agree with plaintiff that, generally, "a master is responsible for the wrongful acts of his servant committed while performing some duty within the scope of his employment." *Rogers v JB Hunt Transport, Inc*, 466 Mich 645, 651; 649 NW2d 23 (2002) (quotation marks and citation omitted). But an employer is not vicariously liable for all negligent acts of an employee. As explained by our Supreme Court in *Janik v Ford Motor Co*, 180 Mich 557, 562; 147 NW 510 (1914):

> The test is whether in the particular service which [the employee] is engaged or requested to perform he continues liable to the direction and control of his original master or becomes subject to that of the person to whom he is lent or hired, or who requests his services. It is not so much the actual exercise of control which is regarded, as the right to exercise such control. To escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under control of a third person. Subject to these rules the original master is not liable for injuries resulting from acts of the servant while under the control of a third person. [Quotation marks and citation omitted.]

It is undisputed that defendant leased housekeeping staff to Henry Ford pursuant to a personnel service agreement. It is also clear from the record evidence that, when defendant's employee was performing housekeeping duties at Henry Ford—including mopping floors—she was not subject to the direction and control of her employer, defendant; rather, she was subject to the direction and control of Sodexo. That is, defendant had resigned full control of its employee to Sodexo. As the trial court held, defendant did not "have supervisory capacity over the [leased] individuals, they simply provided manpower and weren't on the premise[s] supervising the individual workers." Therefore, as the trial court concluded, defendant cannot be held liable for

its employee's negligence in mopping the floor on which plaintiff slipped and fell. Accordingly, the trial court properly granted summary disposition in defendant's favor.

Affirmed. Defendant is entitled to costs as the prevailing party. See MCR 7.219(A).

/s/ Jane M. Beckering
/s/ Mark J. Cavanagh
/s/ Henry William Saad